(2)

Supreme Court, U.S.
FILED
APR 18 1994
OFFICE OF THE CLERK

No. 93-1485

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

FEDERAL DEPOSIT INSURANCE CORPORATION,
IN ITS CORPORATE CAPACITY AS AN INSTRUMENTALITY OF
THE UNITED STATES,

Petitioner,

v.

CHARLES P. COCKE, ET AL.

Respondents,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS JOHN E. HARRISON AND LIGHT & HARRISON, P.C. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. Jonathan Schraub
Counsel of Record
Danny M. Howell
Robins, Kaplan, Miller & Ciresi
1801 K Street, N.W.
Suite 1200
Washington, D.C. 20006
(202) 736-2600
Counsel for Respondents

21 pp

COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether federal law may be applied retroactively to revive claims already time-barred under Virginia law before they were assigned to the FDIC, where the claims arose under and were governed exclusively by state law prior to assignment, and where the expiration of state limitations periods constitutes a vested property right under Virginia law.

LIST OF PARTIES TO THE PROCEEDING IN THE COURT BELOW

The parties to the proceeding in the United States Court of Appeals for the Fourth Circuit are as follows:

Federal Deposit Insurance Corporation
John E. Harrison
Light & Harrison, P.C.
Terry B. Light
Charles P. Cocke
Julius F. Fogel
Lloyd B. Ramsey
Preston L. Walker
John E. Harn, II
Richard E. Blair

There are no parent or subsidiary companies to be listed pursuant to Rule 29.1 of the Rules of the United States Supreme Court.

TABLE OF CONTENTS

PAGE

COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW i

LIST OF PARTIES TO THE PROCEEDING IN THE COURT BELOW ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

STATEMENT OF JURISDICTION 3

COUNTERSTATEMENT OF THE CASE 3

ARGUMENT 4

I. APPLICATION OF FEDERAL COMMON LAW TO REVIVE STATE LAW CLAIMS THAT HAD BECOME STALE PRIOR TO THEIR ACQUISITION BY THE FEDERAL AGENCY, VIOLATES THE RULE OF *GUARANTY TRUST CO.* V. *UNITED STATES* 4

A. Without Exception, Federal Courts Have Applied The Rule Of *Guaranty Trust Co.* v. *United States* To Claims Acquired By The FDIC 5

B. In Determining The Viability Of State Law Claims Before Assignment To The Federal Government, A Federal Court Is Not "Borrowing" A State Statute Of Limitations To Apply To A Federal Cause Of Action, As In *Bryan*. Consequently, No Conflict Exists Between The Tenth Circuit's Decision In *Bryan* And The Decisions Of The Fourth And Fifth Circuits In *Cocke* And *Dawson* 7

PAGE

C. In Determining The Viability Of State Law Claims Before Assignment To The Federal Government, A Federal Court Is Not Deciding The Rights Of The United States Arising Under A Nationwide Federal Program. Consequently, This Court's Decision In *Kimbell Foods* Is Inapplicable To The FDIC's Claims In *Cocke* And *Dawson* 8

D. Over Forty Years Ago, The Very Circuit That Originated The Adverse Domination Rule Anticipated And Rejected The FDIC's Legal Arguments For Applying Federal Law To Toll State Causes Of Action Prior To Their Assignment To The Federal Government 10

E. No Basis Exists Under FIRREA To Apply Adverse Domination To Revive Otherwise Stale State Law Claims 11

F. The Retroactive Application Of The Statute Of Limitations Provided By FIRREA, As Urged By The FDIC, Would Constitute An Unconstitutional Taking Of A Vested Property Right Without Due Process Of Law 13

II. THE FDIC FAILED TO INTRODUCE ANY EVIDENCE IN SUPPORT OF ANY TOLLING THEORY 13

CONCLUSION 14

TABLE OF AUTHORITIES
CASES

	PAGE
American Cas. Co. v. *FDIC*, 944 F.2d 455 (8th Cir. 1991)	11
Austrian v. *Williams*, 198 F.2d 697 (2d Cir. 1952), *cert. denied*, 344 U.S. 909	10, 12, 13
Celotex Corp. v. *Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265	4
Clearfield Trust Co. v. *United States*, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943)	9, 10
Farmers & Merchants Nat'l Bank v. *Bryan*, 902 F.2d 1520 (10th Cir. 1990)	1, 2, 7-9
FDIC v. *American Cas. Co.*, 975 F.2d 677 (10th Cir. 1992)	11
FDIC v. *American Cas. Co.*, 995 F.2d 471 (4th Cir. 1993)	11
FDIC v. *Appling*, 992 F.2d 1109 (10th Cir. 1993)	7
FDIC v. *Belli*, 981 F.2d 838, 842 (5th Cir. 1993)	12
FDIC v. *Cardona*, 723 F.2d 132, 134 (1st Cir. 1983)	6
FDIC v. *Cocke*, 7 F.3d 396 (4th Cir. 1993)	1, 2, 4, 5, 7-10
FDIC v. *Consolidated Mort. & Fin. Corp.*, 805 F.2d 14, 18 (1st Cir. 1986)	6
FDIC v. *Dawson*, 4 F.3d 1303 (5th Cir. 1993)	2, 4, 5-10
FDIC v. *Hinkson*, 848 F.2d 432, 434 (3d Cir. 1988)	6
FDIC v. *Regier Carr & Monroe*, 996 F.2d 222, 225-26 (10th Cir. 1993)	6, 12, 13
Fidelity & Deposit Co. v. *Conner*, 973 F.2d 1236 (5th Cir. 1992)	11

	PAGE
Guaranty Trust Co. v. *United States*, 304 U.S. 126, 142, 58 S.Ct. 785, 82 L.Ed. 1224 (1938)	5, 7, 11
Holmberg v. *Armbrecht*, 327 U.S. 392, 397, 66 S.Ct. 582, 90 L.Ed. 743 (1946)	11
International Rys. of Cent. Am. v. *United Fruit Co.*, 373 F.2d 408, 412-14 (2d Cir. 1967), *cert. denied*, 387 U.S. 921	10
Michelsen v. *Penney*, 135 F.2d 409, 415 (2d Cir. 1943)	10
Randolph v. *RTC*, 995 F.2d 611, 619 (5th Cir. 1993), *cert. denied*, 127 L.Ed. 2d 647 (1994)	12
RTC v. *Hecht*, 833 F. Supp. 529, 531 (D. Md. 1993)	11
St. Paul Fire & Marine Ins. Co. v. *FDIC*, 968 F.2d 695 (8th Cir. 1992)	11
Starnes v. *Cayouette*, 419 S.E.2d 669, 674 (Va. 1992)	13
United States v. *Buford*, 28 U.S. 12, 7 L.Ed. 585, 591 (1830)	5
United States v. *Kimbell Foods, Inc.*, 440 U.S. 715, 99 S.Ct. 1448, 59 L.Ed. 2d 711 (1979)	1, 2, 8-10
Wm. Danzer & Co. v. *Gulf & S.I.R. Co.*, 268 U.S. 633, 45 S.Ct. 612, 69 L.Ed. 1126 (1925)	13

STATUTES AND RULES

11 U.S.C. § 11(e)	10
12 U.S.C. § 84	7
12 U.S.C. § 93	7
12 U.S.C. § 1821(g)	11
28 U.S.C. § 2415(a)(1983)	6
Fed. R. Civ. P. 56	4
Va. Code § 8.01-234	13

No. 93-1485

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

FEDERAL DEPOSIT INSURANCE CORPORATION,
IN ITS CORPORATE CAPACITY AS AN INSTRUMENTALITY OF
THE UNITED STATES,

Petitioner,

v.

CHARLES P. COCKE, ET AL.

Respondents,

BRIEF OF RESPONDENTS JOHN E. HARRISON AND LIGHT & HARRISON, P.C. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents John E. Harrison and Light & Harrison, P.C. (collectively, "Harrison") respectfully request that this Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit submitted by Petitioner Federal Deposit Insurance Corporation ("FDIC"), seeking review of the Fourth Circuit's opinion in this case. That opinion is reported as *FDIC* v. *Cocke*, 7 F.3d 396 (1993).

The FDIC asserts as grounds for granting its petition that the Fourth Circuit's refusal to apply the federal common law tolling rule of "adverse domination" to toll a Virginia statute of limitation, in a suit brought by the FDIC alleging exclusively state law causes of action, is in conflict with *Farmers & Merchants Nat'l Bank* v. *Bryan*, 902 F.2d 1520 (10th Cir. 1990), and with the dictates of *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 99 S.Ct. 1448, 59 L.Ed. 2d (1979). The FDIC argues that the Fifth

Circuit erred similarly in *FDIC* v. *Dawson*, 4 F.3d 1303 (5th Cir. 1993), decided shortly after *Cocke*.

But the FDIC has either misread *Bryan* and *Kimbell Foods*, or has misapprehended the basis for the decision below and in *Dawson*. No conflict whatsoever exists between the *Cocke* and *Dawson* decisions and the Tenth Circuit's decision in *Bryan*. Instead, *Bryan* stands for the unremarkable proposition that in a suit brought by a federal agency to enforce a federal statutory cause of action, federal statutes of limitations and federal "tolling" principles apply. By contrast, in *Cocke* and *Dawson* the FDIC brought purely state law claims. The decisions of the Fourth and Fifth Circuits in *Cocke* and *Dawson* stand for the similarly unremarkable proposition — supported by some 170 years of Supreme Court precedent and adhered to by every Circuit Court that has had occasion to apply the principal to the FDIC — that the mere act of transferring stale state law claims to a federal entity does not revive them.

Moreover, because the FDIC's claims in *Cocke* and *Dawson* arise under state and not federal law, the rule of *Kimbell Foods* (pertaining to when and under what circumstances federal common law will supply rules of decisions with respect to federal causes of action) is wholly inapplicable to the facts of either case.

In the absence of a split in authority among the Circuits, and in the absence of any error below with respect to the applicability of *Kimbell Foods*, the FDIC's petition should be denied. Moreover, for the reasons set forth in respondents' separate Petition for Certiorari, the complete absence of a record below in support of any tolling theory would constitute separate grounds for affirming the portion of the Fourth Circuit's decision complained of by the FDIC, and constitutes separate grounds for denial of the FDIC's Petition.

OPINIONS BELOW

Harrison is satisfied with FDIC's presentation of the opinions below.

STATEMENT OF JURISDICTION

Harrison is satisfied with FDIC's statement of the jurisdiction of the Court.

COUNTERSTATEMENT OF THE CASE

Petitioner, the Federal Deposit Insurance Corporation ("FDIC"), sued Respondents John E. Harrison, Light & Harrison, P.C., and other former directors or outside counsel of McLean Savings & Loan Association ("MSL") and its mortgage banking subsidiary, McLean Financial Corporation ("MFC") in the United States District Court for the Eastern District of Virginia. The FDIC brought suit as the assignee of claims against former directors and attorneys of MSL, by virtue of the federal takeover and assignment of claims from FDIC in its capacity as receiver of MSL. The FDIC brought suit as the assignee of claims against former directors of MFC, by virtue of the federal receiver of MSL having purchased such claims from MFC's estate in bankruptcy (MSL having divested itself of MFC prior to the federal takeover of MSL).

In its complaint, the FDIC alleged that the directors were negligent and breached fiduciary duties in approving certain loans from MSL to MFC, and that outside counsel was negligent in failing to warn about regulatory violations allegedly associated with the loans. The FDIC did *not* allege that defendants had concealed the facts giving rise to a cause of action against them, or that defendants had "adversely dominated" MSL. Harrison C.A. Br. at 16.

Before the District Court, the FDIC acknowledged that all of its claims were state law claims. Harrison C.A. Br. at 22; C.A. J.A. at 89. The District Court granted the motions of Harrison and others for summary judgment on grounds that the applicable Virginia statute of limitations had run prior to the federal takeover of MSL and the assignment of claims to the federal entity.

At the time of the granting of summary judgment motions, the FDIC's opposition papers were not before the District Court because the FDIC's late-filed opposition had been stricken. The FDIC appealed the decision granting summary judgment against it, but did not appeal the order striking its opposition. Harrison C.A. Br. at 12, 13 n.11. The Fourth Circuit reversed and remanded to allow the FDIC to offer evidence in support of tolling the statute of limitations under Virginia law, and in support of a contract basis for its claims against attorney defendants, but made no mention of the lack of a record in opposition to summary judgment before the District Court or on appeal.

Respondents Harrison and Light & Harrison, P.C. have petitioned this Court for writ of certiorari on the basis that the Fourth Circuit improperly ignored the complete absence of any evidence on the issues for which the FDIC bore the burden of proof, in contravention of the provisions of Fed. R. Civ. P. 56 and the holding of this Court in *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265.

ARGUMENT

I. APPLICATION OF FEDERAL COMMON LAW TO REVIVE STATE LAW CLAIMS THAT HAD BECOME STALE PRIOR TO THEIR ACQUISITION BY THE FEDERAL AGENCY, VIOLATES THE RULE OF *GUARANTY TRUST CO.* V. *UNITED STATES.*

The FDIC does not argue in *Cocke* and *Dawson* that the causes of action it acquired by assignment from the state-chartered thrifts were federal causes of action. To the contrary, the FDIC conceded below that it had brought suit as the assignee of state law claims that, prior to such assignment, were governed exclusively by state statutes of limitations. Harrison C.A. Br. at 22; C.A. J.A. at 89.

Instead, the FDIC argues that in determining whether or not the state law claims had become time-barred prior to being assigned to the FDIC, federal courts should only apply a portion

of the state's law as to statutes of limitations. With respect to tolling rules, the FDIC maintains that once a state law claim is assigned to a federal agency, federal courts must apply federal law to ensure that any applicable state statute of limitations is tolled up until the time the claim is assigned to the Federal Government, regardless of whether or how long ago the claim had become stale under state tolling rules. Only the Federal Government would be the beneficiary of such a tolling rule, since absent the happenstance of assignment to a federal entity, the federal tolling rule would not apply.

In advancing this proposition, the FDIC neglects to set forth (either in its petition in *Cocke* or in its petition in *Dawson*) that its argument runs counter to some 170 years of Supreme Court precedent which holds that stale state law claims are not revived merely by virtue of their transfer to the Federal Government. This time-honored rule is most commonly attributed to *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 142, 58 S.Ct. 785, 82 L.Ed. 1224 (1938), but in fact extends back in our jurisprudence at least 170 years.[1]

A. Without Exception, Federal Courts Have Applied The Rule Of *Guaranty Trust Co.* v. *United States* To Claims Acquired By The FDIC.

The applicability of *Guaranty Trust Co.* v. *United States* to the FDIC's acquisition of claims against former directors has been heretofore undisputed by anyone other than the FDIC. Every Circuit that has considered the question has held, pursuant to *Guaranty Trust* or its progeny, that where the state statute

---

[1] *See United States* v. *Buford*, 28 U.S. 12, 7 L.Ed. 585, 591 (1830) ("It can require no argument to show that the transfer of any claim to the United States cannot give to it any greater validity than it possessed in the hands of the assignor. If the character of the claim be so changed as to exempt it from the operation of the statute of limitation after the transfer, such transfer cannot have the effect to take the claim out of the statute when it has run.").

of limitations has expired before the FDIC acquires the claim, it is not revived by transfer to the FDIC.[2]

Moreover, every Circuit that has considered the question has held that where a federal court applies a state statute of limitations to a purely state cause of action to determine its viability when it was acquired by the federal entity, the court must apply all applicable state law, including state law on tolling. *FDIC* v. *Dawson*, 4 F.2d at 1309 ("[T]here is no justification for applying federal equitable tolling principles to pre-receivership events."); *FDIC* v. *Consolidated Mort. & Fin. Corp.*, 805 F.2d 14, 18 (1st Cir. 1986).[3]

---

[2] *See e.g.*, *FDIC* v. *Cardona*, 723 F.2d 132, 134 (1st Cir. 1983); *FDIC* v. *Hinkson*, 848 F.2d 432, 434 (3d Cir. 1988); *FDIC* v. *Dawson*, 4 F.2d at 1309; *FDIC* v. *Regier Carr & Monroe*, 996 F.2d 222, 225-26 (10th Cir. 1993).

[3] In *FDIC* v. *Consolidated Mort. & Fin. Corp.*, state law governed not only the question of what limitation period applied to the state law claims of the failed bank prior to their transfer to the FDIC, but also whether the running of those periods had been interrupted by an acknowledgment. The First Circuit held:

> Different legal standards, however, apply to acknowledgments made before or after acquisition. If the purported acknowledgment took place *after* the FDIC acquired the notes (*e.g.*, assuming the Bank's claim had not by then been cut off by the local statute of limitations [*citing FDIC* v. *Cardona*, 723 F.2d at 134]), the effect of any alleged acknowledgment would be determined by federal law. 723 F.2d at 136. *See* 28 U.S.C. § 2415(a)(1983).
>
> But if any alleged acknowledgment occurred *before* FDIC's acquisition of the notes, *Puerto Rico law alone would determine its sufficiency*.

805 F.2d at 18 (emphasis in original).

B. In Determining The Viability Of State Law Claims Before Assignment To The Federal Government, A Federal Court Is Not "Borrowing" A State Statute Of Limitations To Apply To A Federal Cause Of Action, As In *Bryan*. Consequently, No Conflict Exists Between The Tenth Circuit's Decision In *Bryan* And The Decisions Of The Fourth And Fifth Circuits In *Cocke* And *Dawson*.

In its petition, the FDIC ignores the rule of *Guaranty Trust Co.* v. *United States*, and instead suggests that the *Cocke* and *Dawson* decisions are in conflict with the Tenth Circuit's decision in *Farmers & Merchants Nat'l Bank* v. *Bryan*, which applied the federal common law tolling rule of "adverse domination" to claims brought by the FDIC.

But *Bryan* did not involve any determination of whether state law claims had expired in the hands of the failed bank prior to being assigned to the FDIC. Instead, *Bryan* dealt with alleged violations of lending limits imposed on national banks pursuant to federal statute (12 U.S.C. § 84), for which a cause of action is provided under federal law (12 U.S.C. § 93). Since the National Banking Act did not provide its own statute of limitations, the federal court in *Bryan* "borrowed" the state limitations statute, but applied federal common law as to tolling.[4]

The reason why the *Bryan* decision is inapplicable to *Cocke* and *Dawson*, is explained clearly in the *Dawson* opinion, in which the Fifth Circuit stated that while it "disagree[d]" with *Bryan's* determination that federal tolling rules apply when state limitations periods are "borrowed," it *held* that the "borrowing" rule

---

[4] *Bryan* also involved claims of making "imprudent" loans, but the Tenth Circuit's opinion makes no distinction between these claims and the statutory lending limit violations. At any rate, there is absolutely no indication in the opinion that certain state law claims were brought that would have been deemed stale under state tolling law.

Since its decision in *Bryan*, the Tenth Circuit has applied adverse domination in *FDIC* v. *Appling*, 992 F.2d 1109 (1993), another case involving causes of action based on 12 U.S.C. § 84.

was completely inapplicable to the facts of the case, since "borrowing" occurs in the context of *federal* causes of action. Lawsuits brought by the FDIC as assignee of state law claims, however, involve *purely state law determinations* as to whether such claims were stale prior to being assigned to a federal entity:

> Wholly apart from the flaws in the *Bryan* court's reasoning, we disagree with its holding for the more fundamental reason that *the federal court is not "borrowing" a state statute of limitations at all in these cases brought by the FDIC under FIRREA* . . . because the FDIC is merely acquiring the claims held by the failed bank, the issue is whether the bank would be time-barred if it tried to sue its directors in state court on the date of the FDIC's appointment as receiver. Only if the bank's claims are still viable under state law on that date does the limitations clock start to run anew under FIRREA's limitations provision. Because this step of the analysis is *purely a question of state law*, there is no justification for applying federal equitable tolling principles to pre-receivership events. If the FDIC is to toll the state statute of limitations prior to its appointment as receiver under the adverse domination doctrine, it must show the district court that the state law of adverse domination would permit tolling.

4 F.3d at 1309 (emphasis added).

C. In Determining The Viability Of State Law Claims Before Assignment To The Federal Government, A Federal Court Is Not Deciding The Rights Of The United States Arising Under A Nationwide Federal Program. Consequently, This Court's Decision In *Kimbell Foods* Is Inapplicable To The FDIC's Claims In *Cocke* And *Dawson*.

In addition to its misreading of *Bryan* as conflicting with *Cocke* and *Dawson* as to which law to apply to "borrowed" statutes of limitations, the FDIC relies on *United States* v. *Kimbell Foods, Inc.* to argue that the federal court must apply federal

law to toll state statutes of limitations when state law claims are acquired by the Federal Government. Once again, the FDIC misreads the case.

In *Kimbell Foods*, this Court dealt with when and under what circumstances federal common law will supply rules of decisions with respect to federal causes of action. *Kimbell Foods* is inapplicable to this or any case involving purely state law claims, for the very same reason that the *Bryan* decision and the use of federal law with respect to "borrowing" state limitations periods for federal causes of action is inapplicable.

Kimbell Foods relied principally on *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943), which held that in cases involving *federally created rights* of the United States arising under nationwide federal programs, federal law governs. By contrast, in *Cocke* the Fourth Circuit correctly noted (just as the Fifth Circuit did in *Dawson*) that in the case of *rights created under state law*, the viability of those rights at assignment depends exclusively on state law. Thus, the Fourth Circuit held,

> Although federal law allows the FDIC, as receiver, to bring McLean's claims, the claims are uniquely state-law causes of action acquired through a wholesale takeover of McLean's assets. If it were not for Virginia common law's prohibitions against breaches of fiduciary duty by corporate directors, the FDIC would have no claims to bring. Therefore, this case does not present the situation [as in *Kimbell*] in which [a] federal statute authorizes and outlines federal activity, but neglects to furnish a crucial provision that would effectuate the federal activity more appropriately.

7 F.3d at 400.

D. Over Forty Years Ago, The Very Circuit That Originated The Adverse Domination Rule Anticipated And Rejected The FDIC's Legal Arguments For Applying Federal Law To Toll State Causes Of Action Prior To Their Assignment To The Federal Government.

The Fourth and Fifth Circuits' rejection in *Cocke* and *Dawson* of the FDIC's "borrowing" and *Kimbell Foods* arguments as being inapplicable to the determination of the viability of purely state law causes of action prior to their acquisition by a federal entity, mirrors the very approach taken some forty years ago by the very Circuit which originally formulated the "adverse domination" doctrine.[5] In a parallel situation involving suit by a bankruptcy trustee to enforce state causes of action as to pre-bankruptcy breaches of duties by corporate directors under former 11 U.S.C. § 11(e) (which causes of action became, by virtue of the bankruptcy petition, part of the bankruptcy estate, and subject to enforcement under federal bankruptcy statutes), the Second Circuit in *Austrian* v. *Williams*, 198 F.2d 697 (1952), *cert. denied*, 344 U.S. 909, faced the choice of applying its own federal common law rule of adverse domination, or New York's law which flatly precluded the use of adverse domination by statute.

In *Austrian* v. *Williams*, the Second Circuit held that because state law determined the viability of the acquired state law claim in the hands of the trustee, the federal court may not avoid the use of state tolling law by means of the "borrowing" rule or the rule of *Clearfield Trust Co.* v. *United States* (upon which *Kimbell Foods* is based). 198 F.2d at 702. With respect to *Clearfield Trust*, the Second Circuit held, "[the]clear mandate to apply the state limitations statute . . . includes its application in the manner established by other relevant provisions of state law[,] and state court interpretations of state law." 198 F.2d at

---

[5] *See International Rys. of Cent. Am.* v. *United Fruit Co.*, 373 F.2d 408, 412-14 (2d Cir. 1967) (Friendly, J.), *cert. denied*, 387 U.S. 921, *citing Michelsen* v. *Penney*, 135 F.2d 409, 415 (2d Cir. 1943).

701. In ruling that the borrowing rule was inapplicable, the Second Circuit noted that in the seminal "borrowing" case of *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397, 66 S.Ct. 582, 90 L.Ed. 743 (1946), this Court carefully distinguished between its announced rule for federally created causes of action, and "State-created rights."

E. No Basis Exists Under FIRREA To Apply Adverse Domination To Revive Otherwise Stale State Law Claims.

The FDIC leans heavily on the existence of a federal statutory scheme embodied in FIRREA as proof of its need for a uniform federal rule.[6] But no basis exists under FIRREA to allow the FDIC to revive claims that became time-barred under state law prior to their acquisition by the Federal Government.

Nothing in FIRREA indicates a Congressional intent to revive stale state-law claims. Had Congress desired a different result under FIRREA, Congress could have so provided.[7] However, in revamping the nation's banking laws, Congress left undisturbed the dictates of *Guaranty Trust Co.* v. *United States*.[8] As a result, FIRREA's statute of limitations (and any federal equitable tolling rules) only apply if the FDIC acquired viable claims under state law.

---

[6] Such a uniformity argument has been made by the FDIC in contexts other than statutes of limitations, typically with regard to regulatory exclusions in directors' and officers' liability policies. The argument has been consistently rejected. *See e.g.*, *FDIC* v. *American Cas. Co.*, 995 F.2d 471 (4th Cir. 1993), *citing Fidelity & Deposit Co.* v. *Conner*, 973 F.2d 1236 (5th Cir. 1992); *FDIC* v. *American Cas. Co.*, 975 F.2d 677 (10th Cir. 1992); *St. Paul Fire & Marine Ins. Co.* v. *FDIC*, 968 F.2d 695 (8th Cir. 1992); *American Cas. Co.* v. *FDIC*, 944 F.2d 455 (8th Cir. 1991).

[7] As indeed Congress did so provide in a section of FIRREA pertaining to subrogation rights. *See* 12 U.S.C. § 1821(g).

[8] *See e.g.*, *RTC* v. *Hecht*, 833 F. Supp. 529, 531 (D. Md. 1993) ("[T]here is nothing [in FIRREA] to indicate a Congressional policy that would justify the federal courts' applying a special rule 'trumping' state precedent for the benefit of the RTC.").

Nor may FIRREA be applied retroactively so as to revive otherwise stale causes of action. *FDIC* v. *Regier Carr & Monroe*, 996 F.2d at 225-26; *FDIC* v. *Belli*, 981 F.2d 838, 842 (5th Cir. 1993); *Randolph* v. *RTC*, 995 F.2d 611, 619 (5th Cir. 1993), *cert. denied*, 127 L.Ed.2d 647 (1994).

The FDIC argues, essentially, that unless it is allowed to revive stale state law claims, its national collection efforts will be hampered. Once again, the Second Circuit in *Austrian* v. *Williams* forty years ago rejected the very policy arguments urged today by the FDIC: that its decision would be contrary to the purpose and uniform application of a federal program. The Court noted that under the federal statute, state law was to be applied to determine if the causes of action were alive at time of the petition. Thus, "there can be no escape from the diverse periods of limitations set up in the various state statutes which are applicable however they are construed." 198 F.2d at 702. More important was the absence of any Congressional intent that stale claims were to be revived:

> [It seems] likely [that] Congress did intend to utilize the bankruptcy procedure to expose corporate abuses and, therefore, gave to the trustee sufficient time after his appointment to permit him to investigate the situation and to prosecute any causes of action thus found to exist.
>
> *But this purpose did not include the revival of causes of action which, under the various applicable statutes of limitation, were barred.* We think that the desirability of the repose policy of the state limitations periods was intended to be recognized by Congress and given effect in the manner in which the various states saw fit to make this policy effective. If this be not the purpose of [the statute], then its effect would be to revive, or create, causes of action, a concept without any reasonable basis.

198 F.2d at 702 (emphasis supplied).

Such applicability of state law in fact poses even less of a hindrance to the FDIC's efforts than it arguably does in the bankruptcy context, because unlike the bankruptcy trustee, the FDIC has every means necessary by which to apprise itself of suspected wrongdoing *prior* to receivership, and every power necessary to act on that knowledge.

F. The Retroactive Application Of The Statute Of Limitations Provided By FIRREA, As Urged By The FDIC, Would Constitute An Unconstitutional Taking Of A Vested Property Right Without Due Process Of Law.

The "repose policy of the state limitations periods" referred to in *Austrian* v. *Williams* is more than a policy in Virginia, it is a property right protected by due process, a right that vests upon the running of the limitation period. *Starnes* v. *Cayouette*, 419 S.E.2d 669, 674 (Va. 1992)(the defense that arises by virtue of the lapse of the time fixed in the statute of limitations and the tolling statute is a right "to a valuable property interest" protected by due process guarantees under Virginia law, pursuant to Va. Code § 8.01-234).

Whether by direct, retroactive application of FIRREA's provisions on accrual and limitation periods, or by the *post hoc* application of a national federal tolling rule, the FDIC seeks to revive stale state claims. However, due to the fact that the running of a limitations period in Virginia is a vested property right, such an application of FIRREA or federal common law to these expired Virginia claims would be an unconstitutional taking of property without due process. *See Wm. Danzer & Co.* v. *Gulf & S.I.R. Co.*, 268 U.S. 633, 45 S.Ct. 612, 69 L.Ed. 1126 (1925).

II. THE FDIC FAILED TO INTRODUCE ANY EVIDENCE IN SUPPORT OF ANY TOLLING THEORY.

For the reasons set forth in respondents' separate Petition for Certiorari, the FDIC's failure to offer any evidence in opposition to summary judgment that would justify tolling the statute of limitations under *any* state or federal tolling theory, provides

separate grounds for affirming that portion of the Fourth Circuit's decision complained of by the FDIC, without regard for the question sought to be raised by the FDIC's petition.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBINS, KAPLAN, MILLER & CIRESI

By: _____

J. Jonathan Schraub
Counsel of Record
Danny M. Howell
1801 K Street, N.W.
Suite 1200
Washington, D.C. 20006
(202) 736-2600